

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

THE GILLETTE COMPANY,)
)
Plaintiff,)
) REDACTED - PUBLIC VERSION
v.)
) C.A. No. 15-1158-LPS-CJB
DOLLAR SHAVE CLUB, INC., *et al.*,)
)
Defendants.)

[REDACTED]

JOINT MOTION TO REDACT TRANSCRIPT (D.I. 182)

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Dated: November 28, 2016

Defendant Dollar Shave Club, Inc. (“DSC”) and Plaintiff The Gillette Company (“Gillette”) (together with DSC, the “parties”) respectfully jointly move the Court to redact certain limited portions of the transcript from the October 28, 2016 discovery teleconference, the disclosure of which would cause a clearly defined and serious injury to DSC and/or Gillette. The grounds for this motion are fully set forth below, and the requested redactions are reflected in the transcripts attached as Exhibit A (highlighted) and Exhibit B (redacted).

1. During the October 28 teleconference, the parties discussed [REDACTED]

[REDACTED]
[REDACTED] which has been produced and designated by DSC as “Highly Confidential – Outside Counsel’s Eyes Only” in this case. *See, e.g.*, Ex. A at 17:4-9-17, 20:5-7, 25:24-26:1, 26:15-27:1, 27:20-25, 28:4-6, 29:14, 37:1-14, 37:17-22, 27:24-38:4, 38:14-20, 44:18-21, 45:3-13, 45:15-18, 45:21-23, 46:1-2, 46:23-47:1. Specifically, the parties discussed [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] *See, e.g., id.* at 19:18-20:1, 25:16-20, 27:20-25, 28:9-10, 29:8-12, 31:20, 32:6-7, 32:18-19, 32:22-23, 34:5-8, 36:4-7, 36:14-16, 36:21-37:1, 38:7-12, 39:22-40:17, 43:15-44:4, 44:7-8, 44:10-13, 46:4-11, 47:8. Finally, the parties discussed [REDACTED]

See, e.g., id. at 45:14.

2. [REDACTED]

[REDACTED]¹

3. [REDACTED]

4. Although “[t]he public has a common law right of access to judicial proceedings and records,” this right “is not absolute[.]” *MOSAID Techs. Inc. v. LSI Corp.*, 878 F. Supp. 2d 503, 507 (D. Del. 2012). “Every court has inherent supervisory power, and the Third Circuit has held that courts may exercise that power to deny access to judicial records, for example, ‘where they are sources of business information that might harm a litigant’s competitive standing.’” *Id.* (quoting *Littlejohn v. BIC Corp.*, 851 F.2d 673, 677-78 (3d Cir. 1988)). For example, this Court has allowed redaction of “sensitive information, deemed irrelevant to [the] litigation by the Court, and that is not a matter of public record[.]” *Virgin Atl. Airways Ltd. v. Delta Airlines, Inc.*, C.A. No. 11-61-LPS-CJB, D.I. 173 (D. Del. July 7, 2013) (Ex. C).

5. A party seeking to redact a judicial transcript must establish good cause, which requires a specific showing “that disclosure will work a clearly defined and serious injury to [that party].” *Id.* (quotation marks and citations omitted). “Assessing whether good cause exists to seal a judicial transcript generally involves a balancing process, in which courts weigh the harm of disclosing information against the importance of disclosure to the public.” *Id.* at 507-08. In conducting this balancing process, courts in the Third Circuit may consider a variety of factors, including “whether disclosure will violate any privacy interests” and “whether the case involves

¹ To limit the distribution [REDACTED] the parties have refrained from attaching it here, but will provide a copy to the Court upon request.

issues important to the public.” *Id.* at 508 n.2 (citing *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 787-91 (3d Cir. 1994)).²

6. The parties seek to redact those portions of the transcript [REDACTED]
[REDACTED] which – if disclosed to the public – would reveal competitively sensitive information about [REDACTED]

7. With respect to [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] *See, e.g., Apple Inc. v. Samsung Elecs. Co.*, 727 F.3d 1214, 1225 (Fed. Cir. 2013) (district court abused its discretion when it refused to seal information that could give a party’s “suppliers an advantage in contract negotiations”). This is an unreasonable burden to impose [REDACTED]
[REDACTED]

8. Similarly, the parties seek to redact those portions of the transcript relating to [REDACTED]
[REDACTED]

9. Moreover, although the public may have a general interest in the outcome of this litigation, the public has no interest whatsoever [REDACTED]
[REDACTED]

See LEAP Sys., Inc. v. MoneyTRAX, Inc., 638 F.3d 216, 222 (3d Cir. 2011) (affirming district court’s refusal to unseal portions of a transcript that reflected the terms of a confidential settlement agreement, noting that “[t]he parties are private entities, their dispute has no impact on the safety and health of the public, and their settlement agreements demonstrate a clear intent to

² The remaining *Pansy* factors have no bearing on this motion. *See id.*

maintain confidentiality"). The fact that this sensitive information was discussed in a transcribed proceeding does not transform it into a matter of public interest.

10. Given the serious risk of competitive harm and the lack of any public interest in the confidential details of [REDACTED] the parties have established good cause to redact the limited portions of the transcript highlighted in Exhibit A.

WHEREFORE, the parties respectfully request that the Court grant this motion and direct the Clerk of the Court to docket the redacted transcript attached as Exhibit B.

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DOLLAR SHAVE CLUB, INC., et al.,)
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Defendants.)

[PROPOSED] ORDER

At Wilmington this _____ day of _____, 2016, having considered the parties' Joint Motion to Redact Transcript (D.I. 182), IT IS HEREBY ORDERED that the motion is GRANTED.

The Clerk of the Court shall docket a public version of the transcript containing the redacted material (Exhibit B). The Clerk of the Court shall keep the original, unredacted transcript permanently under seal.

United States Magistrate Judge

Exhibit A

REDACTED IN ITS ENTIRETY

Exhibit B

IN THE UNITED STATES DISTRICT COURT

IN AND FOR THE DISTRICT OF DELAWARE

THE GILLETTE COMPANY,

: CIVIL ACTION NO.

Plaintiff, :

:

v. :

:

DOLLAR SHAVE CLUB, INC., :

: 15-1158-LPS-CJB

Defendant.

Wilmington, Delaware
Friday, October 28, 2016
Telephone Conference

BEFORE: HONORABLE **LEONARD P. STARK**, Chief Judge

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16 Counsel for Defendant

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17 P R O C E E D I N G S

18 (REPORTER'S NOTE: The following telephone
19 conference was held in chambers, beginning at 2:08 p.m.)

20 THE COURT: Good afternoon, everybody. This is
21 Judge Stark. Who is there, please?

22 MR. SMITH: Good afternoon, Your Honor. Rodger
23 Smith at Morris Nichols on behalf of the plaintiff Gillette.
24 I'm joined by my co-counsel, Mark Abate and Alexandra
25 Valenti, both from Goodwin Procter.

1 THE COURT: Okay. Thank you.

2 MS. KELLER: Good afternoon, Your Honor. Karen
3 Keller from Shaw Keller. With me today is Terri Wit from
4 Quinn Emanuel and Christopher Mizzo from Kirkland & Ellis on
5 behalf of Dollar Shave Club.

6 THE COURT: All right. Thank you. And I have
7 my court reporter here. And for the record, it is our case
8 of The Gillette Company versus Dollar Shave Club Inc., Civil
9 Action No. 15-1158-LPS-CJB.

10 This is the time we set to talk about the
11 discovery disputes. Each side raised disputes. I want to
12 start with those that were raised by the defendant Dollar
13 Shave or DSC. So let me hear from DSC first, please.

14 MR. WIT: Thank you, Your Honor. This is Terry
15 Wit from Quinn Emanuel. I'll be speaking on behalf of
16 Dollar Shave Club today.

17 Just as one preliminary issue, I wanted to note
18 that the parties' papers were filed under seal and certain
19 issues that they raised may be subject to the protective
20 order, although of course at least with respect to Dollar
21 Shave Club issue, we would submit that it is not subject to
22 the protective order. In any event, I would anticipate
23 that one or both parties may seek to seal portions of the
24 transcript following the hearing pursuant to the Court's
25 procedures, in the meantime, thus would respectfully request

1 that the transcript be treated as confidential until that is
2 done by one of the parties.

3 The issue that is raised by Dollar Shave Club
4 with in connection with today's call relates to Gillette's
5 wholesale designation of its initial infringement
6 contentions as "Highly Confidential - Outside Counsel's Eyes
7 Only."

8 The parties have met and conferred and reached
9 an impasse on that issue. I won't restate all of the
10 information that is in our letter, obviously, and the
11 authorities that are cited therein but wanted to simply
12 call out for the Court a couple of high level points.

13 Obviously, it is Gillette's burden under the
14 paragraph 6 of the protective order to prove that its
15 infringement contentions contain information that is validly
16 subject to the protective order in terms of being a trade
17 secret or other confidential information that would cause it
18 harm if it was disclosed to the public.

19 What Gillette has redacted, however, from its
20 infringement contentions consists solely of legal
21 infringement positions that it is taking after an analysis
22 of DSC or Dollar Shave Club publicly available products
23 using a handful of well known methods used by everyone that
24 practices in this relatively small industry.

25 Examples would be the acronyms of the four

1 testing methods that they used which relate to use of
2 electron microscopes in various capacities as well as that
3 Gillette may assert a Doctrine of Equivalents theory and the
4 legal arguments and descriptions of the images that are
5 related to those particular issues.

6 Now, in our view, we would note for the record
7 as we did in the brief that all four of the methods, Black
8 Bright Field Transmission, Electron Microscopy, Scanning
9 Transmission Electron Microscopy, Selected Area Diffusion
10 Patterns, and Energy Dispersion Microscopy have all been
11 used in this industry in the analysis of thin filmed
12 coatings on razor blades going back to the 70s and in fact
13 in some cases to the 60s, and we included some authority
14 discussing these very issues as an attachment to our letter
15 brief.

16 Now, arguing that the mere knowledge of fact
17 that Gillette chose these particular tests out of a handful
18 of five or six available scientific methods that can be used
19 to examine blades of this nature in our view is like saying
20 that if this was a medical case and Gillette had chosen to
21 examine a skull using an MRI and a CAT scan but not using
22 an x-ray or a PET scan that somehow that very selection of
23 which test Gillette used should be protectable information
24 which in our view is a bridge too far.

25 This is particularly true in the case of the

1 authority that we point to in the brief and *Constellation* as
2 well as the *Fractus* case from Texas that talk about the fact
3 that even if they have done this testing and even if at one
4 point it might be considered work product, for example,
5 once they plug that into infringement contentions that
6 they -- (audio lost) -- setting out their legal positions,
7 that information is no longer protected as against Dollar
8 Shave Club or the public, particularly given the strong
9 presumption favoring the common law right of public access
10 to court proceedings.

11 But backing up for one second to something that
12 we noted in the brief that I think is really an important
13 issue to place this entire dispute in context. And that is
14 that Gillette's position in the context of its claim charts
15 is particularly unfair under these circumstances because it
16 seeks to use the protective order as a shield while at the
17 same time Gillette is speaking out to the public and the
18 media about the exact same information that is contained in
19 these claim charts.

20 Now, this was an attachment to our submission,
21 Exhibit F I believe it was, a letter that contains various
22 excerpts from the media. And I won't recite all of those
23 but just to give a flavor for the Court.

24 When the complaint was filed, Gillette
25 explicitly and repeatedly represented to the public that

1 Gillette had tested Dollar Shave Club's product and
2 discovered alleged infringement and intellectual property
3 theft in connection with that testing, specifically told
4 the Wall Street Journal that Gillette routinely tests
5 competitors, evaluated Dollar Shave Club's blades and
6 discovered the infringement. They told Ricoh, the tech
7 publication, that Gillette regularly does market surveil-
8 lance and discovered in its most recent round of testing
9 what it believes to be patent infringement in razors and.
10 They told the Washington Post that through this market
11 surveillance, they, quote, spotted the stolen tech in all of
12 Dollar Shave Club razors.

13 Now, however, Gillette is claiming once having
14 put that into the public sphere and raised questions among
15 Dollar Shave Club's customers and vendors and others in the
16 industry, Gillette is claiming the very same test that it
17 touted to purportedly discover that alleged infringement
18 should be shielded from the public, the public shouldn't
19 be able to review that. The Dollar Shave Club shouldn't
20 be able to share that information with its customers which
21 Gillette itself alleges infringe.

22 Gillette has alleged in the complaint that
23 Dollar Shave Club is contributing to the infringement of its
24 customers and yet its own infringement contentions can't be
25 shared with its customers because of its designation of this

1 information as Highly Confidential - Outside Counsel Only.

2 The bottom line is that without being able to
3 freely review Gillette's basis and its arguments, legal
4 arguments, after having examined these publicly available
5 products using basic scientific electron microscope testing
6 methods that have been in the art for 30 years plus, simply
7 makes it impossible for DSC to fully defend itself and it
8 rewards Gillette for gamesmanship.

9 Now, we all know that the standard here is that
10 the public has a great interest in seeing, ascertaining
11 the scope of Gillette's patent, particularly given the
12 contributory infringement allegations that are at issue
13 here. And Gillette's response at best only characterizes
14 some sort of speculative injury when in fact the standard
15 is it has got to show that it has clearly defined serious
16 injury under *Pansy*, and the injury must be shown with
17 specificity. It can't just be broad allegations of harm
18 that are unsubstantiated by specific example.

19 If you carefully parse their responsive letter,
20 all you see is it is a broadly alleged sort of harm that
21 somehow some competitor of Gillette may be able to glean
22 from the fact that it used a handful of a very small
23 number of available tests for this type of work, that it
24 used certain magnifications just as if somebody was doing
25 an MRI would use certain magnification is going to somehow

1 to give it a competitive advantage.

2 The bottom line is that that falls far short
3 of what *Pansy* requires for shielding this information from
4 the public, especially given the important public interest
5 in knowing what the scope is that Gillette asserts of its
6 patent that the public itself can avoid infringement in
7 addition to the ongoing prejudice to Dollar Shave Club in
8 not being able to freely review the contentions both with
9 more than just the two employees that Gillette offered to
10 allow Dollar Shave Club to review them with but also its
11 customers and vendors and others folks that it has business
12 relationships with, again, in a case where they have alleged
13 that those customers, end use customers are directly
14 infringing on the basis of these very same infringement
15 contentions by using these products.

16 Fundamentally, we think that even the authority
17 that was cited by Gillette calls none of that into question.
18 The main authority that they rely on is this case *ExitExchange*
19 which, if you look at it, was only contemplating whether
20 claim charts can be confidential in general in the context
21 of what to include in a particular protective order as a
22 term the parties were arguing about.

23 If you go back and you read those opinions,
24 indeed, all that *ExitExchange* stands for is an unremarkable
25 proposition that, in sum, infringement contentions in

1 general could be confidential. It could contain proprietary
2 information, and the fact that is possible, but not all of
3 them will.

4 THE COURT: All right. Mr. Wit. Mr. Wit.

5 MR. WIT: The point is the ones that are at
6 issue in this case do not contain any proprietary
7 information either of Dollar Shave Club or of Gillette --

8 THE COURT: Mr. Wit.

9 MR. WIT: -- or of Gillette.

10 THE COURT: Mr. Wit.

11 MR. WIT: And it hasn't met its burden thereby.

12 THE COURT: Mr. Wit, do you hear me? I'm trying
13 to ask you a question.

14 MR. WIT: Yes, I can. Certainly.

15 THE COURT: We're going to need to move along.
16 But my question to you is you're relying on *Pansy* and the
17 case law. The plaintiff says, well, you all negotiated the
18 specific order in this case. Is it your contention that
19 even under the terms of that order, they should not be able
20 to, they have not met the language of the negotiated order
21 in this case for designating this stuff highly confidential?

22 MR. WIT: Absolutely, Your Honor. The protective
23 order doesn't take a position, one way or the other, as to
24 whether infringement contentions, infringement contentions are
25 protected or are not protected. Paragraph 1 of the protective

1 order lays out what is protected in terms of information that
2 can be designated highly confidential and therefore is subject
3 to protection, and it involved things such as trade secrets,
4 and if you look into paragraph 2 of the order, information
5 that is especially sensitive such as confidential research and
6 development, financial technical marketing or other sensitive
7 trade secret information, et cetera.

8 It would be one thing, Your Honor, if Gillette had
9 developed its own proprietary testing methodology, right? It
10 had developed a different type of electron microscope testing
11 to examine these razor blades. Arguably, that could be a
12 trade secret that would fall within the protective order, but
13 it has not done. So all it has is used publicly available
14 testing methods in a small universe of available testing
15 methods. There are not many you can use to do this kind of
16 work.

17 It has used those to take pictures of publicly
18 available products and make legal arguments about them.
19 Our view is none of those fall under the protective order,
20 and if Gillette's view were accepted, basically any legal
21 argument in this case would be able to be sealed.

22 THE COURT: All right. Mr. Wit, are you
23 contesting that the specific combination of tests that they
24 chose to use here is not publicly known and is of technical
25 or commercial advantage, or do you concede at least that

1 much?

2 MR. WIT: I do contest that. There is no
3 commercial advantage. The particular combination of tests
4 that Gillette uses, in fact, I would argue that it's not
5 even really a combination. What Gillette has done is they
6 used individual tests to test for different aspects of the
7 products, as any manufacturer in this industry would use
8 those tests. There is nothing specific about adding one
9 test to another in this context that tells you any
10 additional information that you wouldn't get from running
11 the individual tests.

12 In other words, it's not like Gillette would run
13 one test and then apply a second level examination to it
14 that someone else in the industry would not know about. It
15 is, Gillette's contention is that it is merely the selection
16 of the tests, again, four tests out of approximately a half
17 dozen that are available, that should be protected. And we
18 simply take the view that that is not information that, in
19 effect, anyone else would not already know. And, certainly,
20 Gillette has not articulated how it gives it any advantage
21 in the commercial state using those particular tests that
22 everyone in the industry uses.

23 THE COURT: All right. Thank you.

24 Let me hear from Gillette, please.

25 MR. ABATE: Thank you, Your Honor. This is Mark

1 Abate.

2 So as you pointed out, the parties did negotiate
3 the protective order. It has a single tier of confidentiality.
4 And that is I think part of the reason why we're before you.

5 That was very specific as part of the negotiation.
6 We talked about whether to have a prosecution bar, and we
7 decided not to. And the way we handled that is to have a
8 single tier protective order such that confidential material
9 would only be available to outside counsel, and that was hotly
10 debated, negotiated, agreed upon.

11 So the important point here about that is that
12 Dollar Shave Club is not just seeking to change the confidential-
13 ility from one level of confidentiality to another. They're
14 actually seeking to make these documents public, and we think
15 it's clearly not public information.

16 We use a specific battery of tests. We use that
17 to analyze our own products, analyze competitors' products.
18 We view that as confidential to Gillette and subject to
19 the term of the protective order: information that is not
20 publicly known that provides a technical or commercial
21 advantage, including R&D information.

22 And when I say Gillette, I'm not talking about
23 Gillette's outside counsel, I'm not saying that I designed
24 this test with an expert. I'm talking about the in-house
25 people at Gillette, the technical employees at Gillette have

1 decided in their work to use tests in a certain way to see
2 certain things in these films that other people may not have
3 noticed, and that is really what is going on here.

4 I would, Your Honor, if we have a moment, I'd
5 like to just refer to Exhibit A to our letter brief which is
6 an excerpt from the claim chart. And I would just like to
7 look at one of these tests to show you what I'm talking
8 about. And, specifically, I point out page 3 which is the
9 Bright Field Transmission Electron Microscopy Test.

10 And what we're showing here, you see on the
11 right, there are areas labeled AB&C. A is the steel blade
12 substrate, and B and C are layers on top of that substrate.

13 Now, this is a very challenging test to do.
14 The reason why is because we actually cut the blade in half,
15 and these layers B and C are actually on the order of
16 angstroms thick, and an angstrom is a billionth of a meter.
17 So when you cut the blade in half, it is very difficult to
18 maintain those layers intact.

19 We do that, and then we take the electron
20 microscope and look at the image from the side. And what we
21 see here very important. You see where the areas A and B
22 meet? Moving across to the left, there is like a light gray
23 line through the image, and that is the area dividing the
24 layer.

25 And this is important. Let me turn to page 6.

1 This is the augur test. This is spelled like augur, but
2 it's pronounced awe-jay (phonetic). We run a specific augur
3 test. It is extremely sensitive.

4 You can see that the yellow line and the violet
5 line, there is a tremendous amount of scatter, but the
6 important thing is the middle of the graph at around
7 65 nanometers where we labeled B and C are intersecting, we
8 see the yellow and the violet crossover. And we can see
9 that because we're doing a very specific type of augur test
10 with a very specific type of sensitivity. And it turns out,
11 Your Honor, that that crossover coincides exactly with the
12 light gray line that we just saw in the x-ray on page 3.

13 So it's not tests in isolation, it is a
14 combination of tests. It is a specific way of using tests.
15 I'm not saying Gillette invented the electron microscope or
16 Gillette invented augur testing. They did not. But they
17 use it in-house in a specific way that they feel gives them
18 a commercial advantage in the marketplace, and that falls
19 under the protective order.

20 Now, I would point out one last thing on the
21 augur test. If we look at Exhibit G to Dollar Shave Club's
22 letter, that is the article where they say augur testings
23 has been around for a long time.

24 Certainly, augur testing has been around for a
25 long time, but if you look at the graphs on the third page

1 of that article, you will see that the lines are closer to
2 smoother curved. In other words, they don't get the scatter
3 that I was showing in the Gillette augur test. They're not
4 using the same type of sensitivity. They're not looking for
5 the same type of information.

6 These are specific tests Gillette uses to show
7 specific aspects of these layers. What they show are these
8 multiple layers in the DSC accused products demonstrating
9 infringement, and that is the information we're redacting.
10 And we redact some information from the center column in the
11 claim chart where we discuss those tests, but to the extent
12 the information in the center column is not related directly
13 to the tests, we don't redact it. We have only redacted the
14 information where we actually are talking about the specific
15 tests.

16 I would point out a couple of other things. I
17 think Dollar Shave Club hasn't pointed to anyone using any
18 of these tests the way we're using them.

19 I would also mention the *Constellation* case
20 that they're talking about that they rely on. It is a very
21 different case, Your Honor. It's based on a claim chart
22 that was constructed using images off the Internet, so it is
23 a very different type of case, not applicable here.

24 The *ExitExchange* case is a better case. It
25 points to the idea that claim charts can be confidential if

1 they contain confidential information, which they do here.

2 In terms of the gamesmanship, I would say what
3 is really going on here, Your Honor, is we're going to get
4 to the first issue at some point but [REDACTED]

5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]

10 And that is really what is going on here.

11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]

18 THE COURT: All right. Let me ask you a few
19 questions.

20 You say, of course, there were negotiations
21 leading up to the protective order, but the protective order
22 you all came up with doesn't expressly address claim charts.
23 I believe, tell me if I'm wrong, and so why should I think
24 that part of what you all agreed to would have the impact
25 that you're asking for today?

1 MR. ABATE: I believe that the protective order
2 does not address claim charts. I believe that is correct,
3 Your Honor.

4 Well, it's just like any other pleading in a
5 case or document in a case. If we file a brief and it has
6 confidential information, it can be redacted, and it's no
7 different than that. That is how I would analyze it.

8 THE COURT: Is it your view that we can get
9 through summary judgment and all the way through trial and
10 the public will never learn about the combination of tests
11 that your client has used in this case?

12 MR. ABATE: Well, that is a very interesting
13 point you raise, Your Honor.

14 Going to issue one for just a moment, which
15 is the issue about core technical documents and technical
16 documents responsive to our materials, responsive to our
17 production requests.

18 We've asked for technical information. It's
19 quite possible that we could prove infringement based on
20 technical information alone and not have to use these tests.
21 What happened was we were denied the technical information,
22 so we bought products ourselves from the stores in Delaware
23 and tested them, and that is the origin of this work.

24 We did not want to in any way ask for a leave
25 from the current schedule, so we found a way to provide

1 infringement contentions as best we could in the time
2 allotted. Had we been provided with technical discovery
3 from Dollar Shave Club, I don't think we would necessarily
4 need these tests because from the technical documents, we're
5 going to be able to see what we're seeing in these images.

6 THE COURT: Talk about the public statements
7 that your client has made with respect to their case against
8 Dollar Shave. Shouldn't that factor into the analysis here?

9 MR. ABATE: I don't see that at all, Your
10 Honor. Those statements are at a very high level. It is no
11 different than what is in the complaint. It says they're
12 infringing. We believe they're infringing. The complaint
13 was publicly filed.

14 There was a little more detail in one of the
15 statements where they say that we noticed a change in the
16 product. In fact, we produced in this case public documents
17 -- not public, I'm sorry -- nonprivileged documents where
18 we did some testing. [REDACTED]

19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]

1

2 [REDACTED] So a combination of certain tests that we had
3 done which we now produced because they're not privileged,
4 they were internal tests but they're not privileged, because
5 they were done by our technical folks, [REDACTED]

6 [REDACTED]

7 [REDACTED] . We put those two together, and we had the
8 infringement which was in the complaint. So I just don't
9 see it in terms of the press statements.

10 THE COURT: Mr. Abate, I'm just not sure that
11 your position accounts adequately for the public interest
12 and the presumption that litigation is open to the public
13 and the public has an interest in how court resources are
14 being used.

15 Can you help me square your position with the
16 public interest?

17 MR. ABATE: Well, there is confidential
18 information here, so I would say we're allowed to keep
19 that confidential. Gillette, Your Honor, is a tremendous
20 U.S. R&D organization. They manufacture and distribute
21 razors from their facilities in Boston. They have a
22 tremendous research organization. I think it is in the
23 public interest to maintain that type of know-how and trade
24 secrets and confidential information when you have companies
25 like that, and it certainly is in other cases as well.

1 THE COURT: All right. Thank you.

2 Mr. Wit, is there anything you want to respond
3 to, briefly?

4 MR. WIT: Yes. Just very, very shortly, Your
5 Honor.

6 Whatever the merits of Gillette's R&D
7 organization, my simple comment on that issue is they did
8 not develop these tests. These are not proprietary tests
9 that they had used. Nor are these tests that they have said
10 that they necessarily used with respect to every product
11 that they test when they do their market surveillance.

12 What we're talking about for present purposes
13 today are only tests that they have used to test Dollar
14 Shave Club as part of constructing a legal argument regarding
15 infringement. We're not even talking about revealing what
16 is a standard form of testing that Gillette may use on lots
17 of different products in combination, if you even accept
18 Gillette's position that somehow the combination of tests
19 exert some magic conjuring into proprietary information
20 that didn't exist when the tests were individually had.

21 And with respect to, again, these are only
22 tests applied to these products in a case where Gillette
23 has argued that endusers that are buying Dollar Shave Club
24 blades are infringing, and we would contest have a right to
25 know. As is explicitly set out in the *Constellation* case

1 that we cited to the Court, the public has a great interest
2 in ascertaining the scope of Gillette's patent as Gillette
3 interprets it, especially after its press releases, and to
4 not grant a monopoly on an invalid patent. And there is a
5 quote in that case -- and I will wrap up after that -- that
6 says if the infringement contentions are de-designated, the
7 public can better ascertain what the patentee believes is
8 the scope of its patent, allowing the public to avoid
9 infringing activity and/or acquire a license.

10 The burden is not on Dollar Shave Club to show
11 that this information is not protectable, the burden is
12 on Gillette to articulate a clear and specific harm that
13 outweighs what the Supreme Court and numerous courts in
14 the Third Circuit and this District have said to be a
15 significant public interest in the maintenance of public
16 work proceedings.

17 THE COURT: All right. Thank you.

18 On this first dispute, it is I agree Gillette's
19 burden to show here that the infringement contentions should
20 be designated and remain designated as highly confidential.
21 Again, that burden is on Gillette, and I find that Gillette
22 has not met its burden.

23 The issue of which nonproprietary tests
24 Gillette chose to run for purposes of this case to at least
25 develop its infringement contentions to this point against

[REDACTED]

1 this defendant do not warrant the highly confidential designation
2 or the protection that comes with it. I reach that
3 conclusion recognizing notwithstanding that the protective
4 order, arguably its definition of highly confidential is
5 arguably satisfied here. I don't need to decide whether
6 it is in fact satisfied because to the extent necessary, I
7 would be prepared to amend that order to make clear that
8 these infringement contentions are not highly confidential
9 information and are not going to be protected as this case
10 goes forward.

11 I do think it is notable that the protective
12 order doesn't specifically address, as far as I can tell,
13 whether or not infringement contentions can and should be
14 designated highly confidential. And it is an unusual thing
15 that the plaintiff is asking me to do.

16 The information is about the defendant's accused
17 product and what plaintiff is seeking to protect is how it
18 chose to choose again certain nonproprietary tests, tests that
19 are known to the public, in order to test the defendant's
20 product. And I'm just not satisfied that Gillette has met
21 its burden to show that this should be permitted.

22 I see no persuasive showing of a specific injury
23 to the plaintiff on this record. And,

24 By contrast, I believe that the public interest
25 in having access to this set of infringement contentions is

1 strong. The public courts, the public's resources are being
2 used to resolve the parties disputes. The presumption is
3 very strong, of course, that use of the courts and documents
4 filed with the court are to be public. And my guess, this
5 is speculative because these contentions are not going to
6 stay sealed, but my guess is even if they were sealed, it is
7 highly unlikely that we would get through summary judgement
8 and then, after that, trial without it becoming known to
9 the public which tests Gillette used in this case and how
10 it used them in order to at least at this point assess
11 infringement.

12 Here, I do think that the public's interest in
13 access to this information is heightened by the record of
14 public statements that Gillette has made regarding its
15 competitor, the defendant DSC, and is further heightened by
16 the fact this is a patent infringement case and the public
17 does have an interest in knowing what it is the plaintiff
18 thinks it owns in its property right in the patent. And
19 these contentions are clearly some evidence as to the scope
20 the plaintiff believes it has in its patent right. And,

21 Finally, I think if I were not to rule in this
22 way, there would be some amount of prejudice to the defendant
23 in that it would be somewhat hamstrung in its ability to
24 prepare its defense as this case goes forward.

25 So that is my ruling on the issue raised by DSC.

1 Let's move on now to the issues raised by Gillette. And
2 we'll hear from Gillette first, please.

3 MR. ABATE: Thank you, Your Honor. So the first
4 issue has to deal with the technical document production by
5 Dollar Shave Club.

6 We're now close to 11 months into the case and
7 we're starting the *Markman* process in just a few weeks with
8 exchange of claim terms, and we do not have any discovery
9 into the technical issues at the heart of the case.

10 As I mentioned earlier, the patent deals with
11 coatings on the blade, and there is a sealed substrate with
12 coatings on top of that. And the coatings on Dollar Shave
13 Club's blades and the processes by which the coatings are
14 applied are central to the case and Dollar Shave Club's
15 infringement.

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 For example, [REDACTED]

20 [REDACTED]. And we
21 believe those are called for by the Delaware default standard
22 on core technical documents, but they're also called for in
23 our own document requests.

24 Now, [REDACTED]

25 [REDACTED]

[REDACTED]

26

1 [REDACTED] And
2 they rely on the *Princeton Digital* case which is a recent
3 case by Judge Burke.

4 Your Honor, the reasoning in *Princeton Digital*
5 actually supports Gillette, as does the reasoning in the
6 case that is discussed in *Princeton Digital*, and that is the
7 *Avros S.P.A. v Krauss-Maffei Corp.* case, also a Delaware
8 case from 1986.

9 In *Princeton Digital*, the Court did not compel
10 a U.S. corporation to obtain technical documents from its
11 Japanese sister corporation, but there was no evidence in
12 that case that the Japanese sister corporation directed the
13 course of litigation and made important strategic decisions.
14 And that is a quote from *Princeton Digital*.

15 Here, [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 On the next page, [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]

1 [REDACTED] It has got the whole ball of wax.

2 Now, in the *Avros* case that I mentioned, the
3 subsidiary was required to produce technical documents from
4 a German parent corporation. So we see in *Princeton Digital*
5 Judge Burke addresses *Avros* in great detail and he goes
6 through specifically in six details in *Avros* that the Court
7 relied on to show that the one company had to get documents
8 from the other. And in *Princeton Digital*, only one of those
9 factors applied.

10 But here, in fact, four of those *Avros* factors
11 apply. Four out of the six. And I just want to take a
12 second to go through them.

13 And what I would suggest to Your Honor is we're
14 closer to *Avros* where the Court did require a subsidiary to
15 produce documents from a German parent than we are to
16 *Princeton Digital* where the Court did not require that type
17 of production.

18 So in *Avros*, one of the factors was that the few
19 technical documents produced by the subsidiary came from the
20 parent. [REDACTED]

21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]

1 So that is factor one in Avros.

2 Factor two is litigation decisions were made by
3 the parent.

4 Well, that is the case here. [REDACTED]

5 [REDACTED]
6 [REDACTED]
7 Avros factor 3 was the parent developed the
8 accused product.

9 That is true here. [REDACTED]

10 [REDACTED]
11 And the fourth factor in Avros that was
12 discussed in *Princeton Digital* is that the parent company
13 would receive a direct benefit from the decision in the
14 case.

15 And that is true here also because [REDACTED]

16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]

21 So, again, we have four of the Avros factors
22 satisfied here. Only one was satisfied in *Princeton Digital*
23 out of six total factors that were identified in *Princeton*
24 *Digital*. So I suggest to you we're closer to Avros where
25 the production was required than we are to *Princeton*

1 *Digital.*

2 In both of those cases, the Third Circuit test
3 was identified -- there were a couple of different tests
4 identified, but one of them is whether the litigating
5 corporation had acted with its sister in effectuating the
6 transaction giving rise to the suit and is litigating on
7 its behalf.

8 And that is true here. [REDACTED]

9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]

13 THE COURT: Mr. Abate.

14 MR. ABATE: [REDACTED]

15 THE COURT: Mr. Abate.

16 MR. ABATE: Yes.

17 THE COURT: What about the test as to whether or
18 not Dollar Shave has control as in the legal right to obtain
19 the documents on demand? Are you contending that you have
20 that here?

21 MR. ABATE: The test, well, it's control under
22 Rule 34 is required, but it doesn't require the legal
23 right to obtain documents. It requires either a legal or a
24 practical ability to obtain documents. That is stated in
25 *Princeton Digital*, and along with the case, we cited a case

1 in our brief that states that as well, but it is also cited
2 in *Princeton Digital* that the practical ability can be
3 sufficient and that a party cannot hide behind this artifice
4 to prevent getting the documents.

5 So, for example, *Princeton Digital*, on page 2,
6 it's a test I mentioned. The litigating corporation had
7 acted with its sister in effectuating the transaction giving
8 rise to the suit and is litigating on its behalf. It
9 doesn't need absolute legal control.

10 Another test that *Princeton Digital* mentions is
11 alter-ego. If alter-ego is established, certainly, you have
12 to produce the documents, but there is an alternative test
13 that the litigating corporation is acting in the transaction
14 and the litigation going forward on its behalf, and that is
15 true here.

16 I will also mention on this point, Your Honor,
17 that *Princeton Digital*, the specific facts in that case were
18 related corporations, but both *Princeton Digital* and *Avros*
19 recognize that a corporate relationship is unnecessary. The
20 language used in *Avros* is "As long as there is sufficiently
21 close cooperation ..." That is a quote from *Avros* at 129 and
22 130. "As long as there is sufficiently close cooperation
23 between the party in the litigation and the foreign entity,
24 that is sufficient."

25 And that language is mentioned also in *Princeton*

1 Digital at pages 2 and 5.

2 THE COURT: All right. Mr. Abate, would
3 accepting your --

4 MR. ABATE: Yes.

5 THE COURT: Would accepting your position
6 require me to disagree with what this Court has said in
7 *Inline Connection v AOL* or in *Power Integrations v Fairchild*?

8 MR. ABATE: I don't believe so. I thought that
9 the *Princeton Digital* case was particularly well reasoned in
10 terms of dealing with all this precedent, and it looked to
11 *Avros* as being the leading case in the District and talked
12 about the specific factors there and how they apply.

13 So I think there is sort of a line. There is a
14 line that is consistent with all these cases where we see in
15 this case the *Avros* factors, four of the six are satisfied.
16 It's not problematic in terms of the other cases that you
17 mentioned, *Inline* and the other.

18 THE COURT: All right. What would be wrong or
19 prejudicial about having you go through the Hague Convention
20 and seeking this directly from [REDACTED]?

21 MR. ABATE: Thank you for asking that question.
22 Korea has opted out of the discovery provision of the Hague
23 Convention. I'm sure that opposing counsel is aware of that.

24 The situation in *Princeton Digital*, Your Honor,
25 is that Judge Burke mentioned that the parties should go

1 through the Hague and get the documents from the Japanese
2 corporation that way. But Japan had signed on to the
3 discovery provision of the Hague, Korea has not. Korea has
4 not.

5 You might notice in Dollar Shave Club's letter,
6 they don't say -- [REDACTED]

7 [REDACTED]. They didn't say if we went
8 through the Hague, we would get the documents. They say we
9 could go through the Hague. But the fact is we won't get
10 the documents through the Hague because Korea has opted out
11 of that provision.

12 THE COURT: All right. So it is your
13 contention, Mr. Abate, you have no other way to get these
14 documents unless I agree with you on this issue; is that
15 right?

16 MR. ABATE: That is correct, Your Honor.

17 One other thing I would add is it is really an
18 issue of timing at this point because [REDACTED]

19 [REDACTED] and there is a motion to dismiss for lack of
20 personal jurisdiction, but we expect it will be denied
21 because the stream of commerce theory applies here in Your
22 Honor's own cases; but nonetheless, [REDACTED]

23 [REDACTED] at some point down the road we'll get these documents,
24 so it is a question of timing. Do we get them now or do we
25 get them later?

1 As I mentioned at the outset, we're faced with
2 the *Markman* process starting in just a few weeks, so we need
3 them now because it just helps identify what the terms are
4 that need to be construed to have an understanding of the
5 accused product. That is the whole reason we have the early
6 exchange of core technical documents.

7 THE COURT: All right. We're starting to run
8 out --

9 MR. WIT: So, Your Honor --

10 THE COURT: All right. Mr. Abate, we're
11 starting to run out of time. I know you have a whole other
12 issue. Do you want to spend a few moments on that one?

13 MR. ABATE: Sure. The second issue I can handle
14 relatively briefly.

15 We're looking for discovery of all their
16 products. That is what our discovery request covers is all
17 their products. And what they limit us to is the commercial
18 product named in the complaint.

19 Now, to the extent they imported a product and
20 haven't commercialized it, to the extent they have samples
21 of a product they manufacture that they're putting through
22 market testing, those are infringing acts, Your Honor.
23 Importation is infringement. Testing is infringement, it's
24 a use. And we're entitled to that.

25 That is really the difference with their *EPOS*

1 case that they cite. *EPOS*, the manufacturer was resisting
2 the discovery and it had certain prototypes, and, in fact,
3 one prototype was called a pre-prototype. So it was very
4 far from commercialization.

5 That is not the situation here. [REDACTED]

6 [REDACTED]
7 [REDACTED]
8 [REDACTED] The fact that it is commercialized
9 doesn't matter. That is an infringing product that has been
10 imported. If they're doing market testing, that testing is
11 infringing. If they're considering it for commercialization,
12 we want to know that as well because the product could be
13 released before the trial in this case which is 18 months
14 away.

15 The point is that the difference between our
16 case and the *EPOS* case is we're talking about a fully formed
17 product in the hands of a distributor.

18 THE COURT: All right.

19 MR. ABATE: That is very different. It can be
20 released at any moment, very different from a prototype.

21 THE COURT: All right. Thank you. Let me hear
22 from DSC, please.

23 MR. WIT: Thank you, Your Honor. Again, this is
24 Terry Wit from Quinn Emanuel.

25 With respect to my colleague, Mr. Abate, I think

1 that he has misquoted Judge Burke's opinion in *Princeton*
2 *Digital*. I have the opinion in front of me. It is very
3 clearly says: "In the absence of control by litigating
4 corporation over documents in the physical possession of
5 another corporation, the litigating corporation has no duty
6 to produce," citing to the *Gerling* case.

7 In the next sentence, it says: "In the context
8 of Rule 34(a), our court has found the documents are in the
9 'control' of a litigating party if that party has the 'legal
10 right to obtain the documents required on demand' from the
11 nonparty corporation," going on to cite both *Inline*
12 *Connection* and *Power Integrations*, which are the two cases
13 that Your Honor mentioned, both of which explicitly rejected
14 the practical ability test that Gillette seems to be relying
15 on in making its arguments here.

16 With respect, I think that Gillette's position
17 here would quite clearly call for the Court to disregard
18 not just *Princeton Digital* but also *Inline* and *Power*
19 *Integrations*.

20 I know that we don't have much time, but very
21 briefly I will take up the issue that Mr. Abate raised with
22 respect to the *Avros* decision.

23 Mr. Abate ignored several other factors that
24 don't fall in his favor that were discussed in Judge Burke's
25 opinion in the *Avros* case.

1 No. 1, in that case, they were dealing with a
2 wholly owned subsidiary and exclusive seller of the parent
3 company's products in the United States, neither of which is
4 true here. [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 He also ignored the second factor Judge Burke
9 cited on page star five of the opinion, which is there were
10 four members comprising the subsidiary's board of directors
11 that were all employees of the parent and two of them played
12 prominent roles in the management of the domestic company
13 that was the party in the case.

14 Again, it is not at all true here. [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 The third factor listed by Judge Burke was that
18 every one of the four documents that had been produced in
19 the case by the domestic litigant were produced -- or, I'm
20 sorry, were obtained from the files of the foreign entity.

21 That is also not the case here. [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 [REDACTED]

37

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]

13 It is quite clear from any even cursory, let
14 alone detailed, review of [REDACTED] that was
15 referred to by Mr. Abate that there is no right, legal
16 right or otherwise, certainly not a practical ability for
17 Dollar Shave Club [REDACTED]

18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]

23 In addition, in the Avros case, although Mr.
24 Abate wants to argue that because [REDACTED]

25 [REDACTED]

1 [REDACTED]
2 [REDACTED] there is no evidence, unlike in Avros, [REDACTED]
3 [REDACTED]
4 [REDACTED] You know, there is no evidence in the record,
5 and again it is Gillette's burden to come forward with that.

6 Similarly, their last two factors regarding
7 the development of the accused products, [REDACTED]

8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 Effectively, Gillette's argument would put,
14 would effectively state a legal position that [REDACTED]

15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]

21 So just as a very quick example to illustrate
22 the length of the argument that Gillette is trying to make
23 here:

24 If someone sued the local Verizon Wireless
25 retailer for patent infringement for sales of a Samsung

1 phone, for example, and Verizon had some product
2 specifications and quality control specs that were in its
3 supply agreements that allows them to know the size of the
4 phone, et cetera, Gillette's argument would require that
5 Verizon retailer to have control and access to and produce
6 Samsung's highly technical component manufacturing documents
7 as to how the phone was actually made. The law simply does
8 not go that far.

9 With respect to the Hague Convention issue. I
10 think that Mr. Abate oversimplified. There are certain
11 reservations that the Republic of Korea has made with
12 respect to the Hague Convention that apply to document
13 discovery. It is not clear whether if Gillette were to
14 submit a document discovery request whether that would be
15 enforced or not or whether the scope of it would be enforced
16 or not. There are other provisions of the Hague Convention
17 reservations by Korea that apply to depositions that
18 Mr. Abate ignores.

19 In any case, the argument that he tries to make
20 with respect to the timing of the case and how *Markman* is
21 coming up, what I would note about that is very briefly that
22 Gillette has known for years that [REDACTED]

23 [REDACTED] They never contested that.
24 [REDACTED]
25 [REDACTED]

40

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]

5 And during the initial Rule 26 conference in
6 March, [REDACTED]

7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]

11 In the seven months since then, [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]

18 So clearly what we have here is a circumstance
19 where Gillette has known who has these documents, has sat on
20 any rights that it might have to seek them, is now seeking
21 to circumvent that by getting them through Dollar Shave Club.

22 With respect to the last issue, I think this
23 is actually fairly straightforward issue regarding
24 non-commercialized future product.

25 To be clear, Dollar Shave Club has already

1 agreed to produce all documents that it might have relating
2 to past and present Dollar Shave Club razor products that
3 would have these coatings on razor blades. The only issue
4 before the Court is whether Dollar Shave Club is also
5 required to produce relating to non-commercialized future
6 products that might be contemplated.

7 Now, as set forth in the briefing, existing
8 products are the support for Gillette's cases. If you look
9 at the *Invensas* case that is cited and the *Kimberly-Clark*
10 case that is cited, in both of those cases, what was at
11 issue were existing or past products, not future products
12 that are still in research and development.

13 If you look at the cases cited by Dollar Shave
14 Club, including *Fenster Family Patent Holdings*, which Mr.
15 Abate ignored, as well as the *EPOS* case, those cases say
16 quite clearly in Delaware, the *Fenster Family* case found
17 when a product has not been finalized, remains in flux and
18 is still in stages of research and development, the other
19 side is not entitled to discovery.

20 And there is a basic reason for that. It has
21 nothing to do with Gillette's infringement claims because no
22 product has been made that it can insert infringement on.

23 And in *EPOS*, you even have the physical
24 manifestation of the product, and the Court still found
25 because it had not been commercialized and put on the

1 market, the other side is not entitled to discovery of it.

2 Respectfully, this request is not seeking
3 products that might come out in the future. Even if there
4 are any that are being contemplated, it is so overbroad as
5 to constitute a fishing expedition by one of Gillette's --
6 by Gillette into one of its main competitor's future plans
7 and has zero relevance to the infringement claims that have
8 been asserted actually in the case.

9 THE COURT: Mr. Wit, it's now being alleged at
10 least today that if your client has imported or tested any
11 other products, that that is an act of infringement. What
12 is response to that?

13 MR. WIT: First off, Your Honor, I'm not aware
14 that that has actually happened, and it was not alleged in
15 Gillette's letter.

16 But, secondly, I think that the cases that
17 we cite in the brief, in the letter brief stand for the
18 proposition that even if a physical manifestation of the
19 product has been made, for example, the prototype that was
20 at issue in the *EPOS* case, that unless that product is being
21 commercialized for sale or has been sold, it is not relevant
22 to discovery in an infringement case.

23 THE COURT: All right. Thank you.

24 Mr. Abate, briefly, if you want to reply, you can.

25 MR. ABATE: Your Honor, I would like to comment

1 on the timing, and just state that it took us a very long
2 time to get this issue before the Court.

3 I know Mr. Wit talks about, he makes it sound
4 like we sat on our hands, but it was a tremendously long
5 time to get the issue before the Court. There were a number
6 of delays, including the fact that, quite honestly, Your
7 Honor, Dollar Shave Club would not grant us an audience for
8 a meet and confer at certain times. So we had to wait for
9 an oral meet and confer, and it took us a long time to get
10 here to present this issue to the Court. And we are where
11 we are. I mean I don't know what to say about that, but
12 that is exactly what is going on. It's not that we delayed.

13 And one other thing I should mention on that
14 point. Mr. Wit has said a number of times, not before Your
15 Honor the first time here but in front of Judge Burke, [REDACTED]

16 [REDACTED] That is
17 just not the case, Your Honor.

18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]

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5 That did come along during this litigation, but
6 as I said, we have been working very hard to tee this issue
7 up for an awfully long time. And, in fact, [REDACTED]

8 [REDACTED] before we got the issue teed up. It took
9 us that long to get the issue teed up. We were facing the
10 deadline for amending pleading, [REDACTED]

11 So it is really just a timing issue. [REDACTED]

12

13 [REDACTED] and I think it is
14 totally legitimate under the *Princeton Digital* case. I
15 think that the way that Mr. Wit is reading those six factors
16 is far too limited. They're laid out very clearly in the
17 case, and they apply here.

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22 THE COURT: All right. Mr. Abate.

23 MR. ABATE: Dorco is --

24 THE COURT: Mr. Abate, I have only got about
25 another minute.

1 MR. ABATE: Yes. Sure.

2 THE COURT: I don't mean to interrupt.

3 You say [REDACTED]

4 but Mr. Wit points out there is no evidence of that. [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 MR. ABATE: Well, [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 They stated that in -- actually, I have more
11 evidence of that. It's DI 16, Your Honor, at page 3. There
12 is a reference to that [REDACTED]

13 [REDACTED]
14 In the [REDACTED], there
15 is a long recitation about [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 THE COURT: But does all of that --

20 MR. ABATE: There is --

21 THE COURT: I'm sorry, Mr. Abate, but [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 MR. ABATE: Well, I believe that is what they
25 said in their -- it was a joint letter to the Court, DI 16.

1 [REDACTED]

2 [REDACTED]

3 THE COURT: Do you have any reason to doubt the
4 representation that [REDACTED]
5 [REDACTED]
6 [REDACTED]

7 MR. ABATE: Well, I don't know the answer to
8 that. They may have, but [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]

12 THE COURT: All right. I'm just going to --
13 thank you.

14 MR. ABATE: There were some here.

15 THE COURT: All right. Thank you. I appreciate
16 the argument. Let me give you my decisions.

17 With respect to the first issue raised by
18 Gillette seeking an order compelling production of core
19 technical documents, I'm ruling for the defendant, for DSC
20 on this one.

21 The burden is on Gillette, and I just find on
22 this record that the burden is not met. I'm not persuaded
23 on this record that [REDACTED]

24 [REDACTED] I'm further not persuaded that [REDACTED]
25 [REDACTED]

[REDACTED]

1 Relatedly, I'm just not persuaded at this
2 point on this record that the Gillette has met the test
3 articulated by decisions of this Court, for instance, in
4 *Princeton Digital, Inline and Power Integrations.*

5 Further, while I don't know the details of how
6 the Hague Convention works and to what degree it would allow
7 some discovery here directly from [REDACTED] given the status of
8 Korea's participation or not in that agreement, I do think
9 it is noteworthy that evidently there hasn't been an effort
10 to pursue that in all of the months that that could have
11 been done, so I can't definitively say that no relief could
12 be forthcoming from other channels.

13 So my decision is for the defendant on that one.

14 On the last issue, I do agree with the plaintiff,
15 and so my decision is for Gillette. Specifically, if the
16 defendant has responsive information relating to products that
17 it has imported and/or is testing that is alleged as to be
18 potentially infringement, and the fact that those products
19 evidently may not yet be commercialized I don't think under
20 the circumstances here insulates them from production. I
21 think to the contrary, at least in this case, such materials
22 are relevant, and I'm not seeing any other basis to deny the
23 relief requested.

24 I'm afraid I'm late for another matter. Is

1 there anything urgent I didn't address that we need to talk
2 about right now, Mr. Abate?

3 MR. ABATE: No. Thank you, Your Honor.

4 THE COURT: And Mr. Wit?

5 MR. WIT: No. Thank you very much, Your Honor.

6 THE COURT: Thank you all very much. Good-bye.

7 (Telephone conference ends at 3:11 p.m.)

8

9 I hereby certify the foregoing is a true and accurate
10 transcript from my stenographic notes in the proceeding.

11

/s/ Brian P. Gaffigan
Official Court Reporter
U.S. District Court

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CERTIFICATE OF SERVICE

I, David M. Fry, hereby certify that on November 28, 2016 this document was served on the persons listed below in the manner indicated:

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